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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 TRICIA LECKLER, on behalf of herself and all
9 others similarly situated,

10 Plaintiffs,

11 v.

12 CASHCALL, INC.,

13 Defendant.
14 _____/

No. C 07-04002 SI

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

15 On May 14, 2008, the Court heard argument on the parties' cross-motions for partial summary
16 judgment. Having considered the arguments of counsel and the papers submitted, the Court hereby
17 GRANTS plaintiff's motion for summary judgment and DENIES defendant's motion for summary
18 judgment.

19 **BACKGROUND¹**

20 The parties have stipulated to the following undisputed facts. Plaintiff Tricia Leckler applied
21 for a personal loan from defendant CashCall, Inc., in the amount of \$2,500 in December 2005. On her
22 loan application, she was asked to provide her home, cell, and work phone numbers, as well as her email
23 address, home address, and other contact information, all of which she provided. Plaintiff also listed
24 her cell phone number on other correspondence she sent to defendant on December 17, 2005, and
25 August 16, 2006. *See* Statement of Undisputed Facts at ex. A. Defendant approved the loan application
26

27 _____
28 ¹ Unless otherwise noted, the following facts are taken from the parties' jointly submitted
statement of undisputed facts.

1 and lent plaintiff \$2,575 on December 19, 2005. The Truth in Lending Disclosure included with the
2 loan indicated that the annual percentage rate would be 89.91%, *id.*, and plaintiff still has not paid off
3 the loan.

4 When plaintiff fell behind on her monthly payments, defendant began collection activities
5 against her. These activities included placing calls to plaintiff's cell phone number, and some of these
6 calls to her cell phone used prerecorded messages and an automatic telephone dialing system, i.e. an
7 autodialer. None of the calls made to plaintiff's cell phone were for emergency purposes. The minutes
8 incurred by plaintiff for these calls were counted toward the minutes plaintiff purchased as part of her
9 cell phone plan. The parties also agree that plaintiff never asked defendant not to contact her on her cell
10 phone, and that while plaintiff "never informed CashCall that it could contact her on her cellular
11 telephone by means of prerecorded messages and/or autodialed calls," plaintiff also "never informed
12 CashCall that it could not contact her on her cellular telephone by means of prerecorded messages
13 and/or autodialed calls." Statement of Undisputed Facts at ¶¶ 16-17.

14 Plaintiff filed this suit in federal court on August 3, 2007, alleging that defendant violated the
15 Telecommunications Consumer Protection Act ("TCPA") by placing calls to plaintiff's cell phone using
16 an autodialer and prerecorded messages, without her prior express consent. The complaint alleges both
17 negligent and willful violations of the Act. Complaint at ¶ 27-34. Plaintiff brought the suit on behalf
18 of herself and a putative nationwide class of people who received similar calls placed by defendant on
19 their cell phones within four years prior to the filing of the complaint. *Id.* ¶ 15-16, 18. Plaintiff estimates
20 that the class numbers "in the tens of thousands, if not more." *Id.* ¶ 17. The complaint alleges that this
21 Court has jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") because at least one class
22 member will be a citizen of a different state from defendant and because, when the \$1,500-per-call
23 penalty is multiplied by the thousands of putative class members, the \$5,000,000 amount in controversy
24 threshold will be exceeded. *Id.* ¶ 2. On September 5, 2007, defendant filed an answer to the complaint
25 as well as a counterclaim for breach of contract and money had and received in relation to plaintiff's
26 outstanding debt. Currently before the Court are cross-motions for partial summary judgment filed by
27 both parties on plaintiff's two causes of action.
28

LEGAL STANDARD

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party’s case. *See id.* at 325.

The burden then shifts to the non-moving party to “designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment.” *Id.*

DISCUSSION

Both parties now move for partial summary judgment on the same question: whether defendant violated the TCPA when, as part of its collection efforts, it placed telephone calls to plaintiff’s cell phone number using an automatic dialing system and prerecorded messages. The parties agree that this question hinges on the propriety of a ruling by the Federal Communications Commission (“FCC”) that clarified that “autodialed and prerecorded message calls to wireless numbers provided by the called

1 party in connection with an existing debt” are permissible under the TCPA because they fall under the
2 exception for calls made with the “prior express consent” of the called party. FCC Declaratory Ruling,
3 FCC 07-232, at ¶ 9 (Dec. 28, 2007) (“2007 FCC Ruling”). The parties also agree that the case of
4 *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), provides the
5 appropriate standard of review of the FCC’s ruling. None of the material facts are in dispute, and the
6 parties have submitted a statement of undisputed facts. The Court therefore finds that summary
7 adjudication of the legal question presented is appropriate.

8 As a threshold matter, the Court must address whether it has jurisdiction over this case. The
9 Ninth Circuit has held that “state courts have exclusive jurisdiction over a cause of action created by
10 . . . the Telephone Consumer Protection Act of 1991.” *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir.
11 2000) (relying on language in the TCPA found at 47 U.S.C. § 227(b)(3)). That ruling, and similar
12 rulings by other courts of appeals, addressed only whether federal-question jurisdiction was proper
13 under the TCPA. The Ninth Circuit has not considered whether a federal court could exercise diversity
14 jurisdiction or jurisdiction under CAFA over a case alleging violations of the TCPA. Other courts have
15 held, however, that alternative forms of federal jurisdiction are proper for TCPA suits. *See Brill v.*
16 *Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005); *Kinder v. Citibank*, 2000 WL
17 1409762, at *3 (S.D. Cal. Sept. 14, 2000) (“Nothing in the Ninth Circuit’s analysis suggests that the
18 TCPA precludes district courts from hearing private TCPA claims where some other independent basis
19 for federal jurisdiction exists, such as diversity of citizenship or supplemental jurisdiction.”); *see also*
20 *Kirsch v. Cuadra*, 2005 WL 2677026, *1 n.3 (N.D. Cal. Oct. 20, 2005). The Court agrees, and finds
21 that it may exercise jurisdiction over this class action under CAFA.

22 In evaluating an agency’s construction of a statute under *Chevron*’s two-step analysis, the Court
23 first must determine “whether Congress has directly spoken to the precise question at issue. If the intent
24 of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect
25 to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. If, on the other
26 hand, the Court “determines Congress has not directly addressed the precise question at issue,” such that
27 “the statute is silent or ambiguous with respect to the specific issue,” the Court must move on to the
28 second step to determine “whether the agency’s answer is based on a permissible construction of the

statute.” *Id.* at 843. Where “Congress has explicitly left a gap for the agency to fill,” the agency’s rules will be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44. Where, however, Congress has only implicitly delegated rulemaking authority to an agency, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844.

Plaintiff argues that the Court need not proceed to step two of the *Chevron* analysis because the statutory provision at issue is unambiguous and requires no further interpretation. The TCPA provides, in pertinent part:

It shall be unlawful for any person . . . to make any call (*other than a call made for emergency purposes or made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Plaintiff argues that there is no ambiguity in Congress’ exception for calls made with the called party’s consent, because Congress clearly stated that such exception is applicable only where called party has given its “prior express consent.” *Id.* The Court agrees with plaintiff, in part, that Congress’ intent is clear, because the phrase “prior express consent” is unambiguous and consists of three words with discernable, ordinary meanings. That said, the TCPA does not address the “precise question at issue” here, *Chevron*, 467 U.S. at 843, because it does not delineate what constitutes “prior express consent” and does not answer the question whether the provision of a cell phone number on a loan application serves as express consent. The FCC, in carrying out its authorization to interpret the TCPA, *see, e.g.*, 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”), has issued an order clarifying whether this situation – specific to lenders who use autodialers or prerecorded messages to communicate with their customers – meets Congress’ exception for “prior express consent,” and the Court must give deference to the FCC’s construction unless it is manifestly contrary to Congress’ intent or unreasonable.

On January 4, 2008, in response to a petition filed by ACA International,² the FCC issued a declaratory ruling, adopted December 28, 2007, which held that “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt,” and thus that “autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party.” 2007 FCC Ruling at ¶ 9. The Court finds this construction of “prior express consent” both “manifestly contrary to the statute” and unreasonable, *Chevron*, 467 U.S. at 844, because it impermissibly amends the TCPA to provide an exception for “prior express *or implied* consent” and flies in the face of Congress’ intent.

Black’s Law Dictionary defines “express consent” as “[t]hat directly given, either *viva voce* or in writing. It is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.” *Black’s Law Dictionary* 276 (5th ed.1979). Similarly, it defines “express” as “[c]lear. Definite. Explicit. . . . Declared in terms; set forth in words. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.” *Id.* at 521. By contrast, “implied consent” is defined as “[t]hat manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.” *Id.* at 276. Although the Court does not doubt that by providing her cell phone number on her loan application and in subsequent correspondence plaintiff consented to be called by defendant, such consent was implied through her actions and conduct, i.e. writing down her cell phone number in a space labeled for such information, rather than expressly given in words or “direct and appropriate language” explicitly stating that plaintiff consented to be called with an autodialer or prerecorded message.

In response to this argument, defendant contends that Congress intended the “prior express consent” in question to apply merely to the act of calling, i.e. consent to be called in general, and did not intend the express consent to apply to the act of calling using an autodialer or prerecorded message. The Court disagrees. If the exemption were to apply whenever a called party gave prior consent to be

² ACA International is “an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services. ACA represents approximately 5,800 company members ranging from credit grantors, collection agencies, attorneys, and vendor affiliates.” 2007 FCC Ruling at ¶ 1, n.1.

1 called in general, without any consideration given to the method or type of call, the exemption would
2 be contrary to the logic of the statute, which targets only those calls made using an autodialer or an
3 artificial or prerecorded voice. As the FCC has recognized, Congress enacted the TCPA in part because
4 “Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion
5 of privacy than live solicitation calls. Moreover, such calls can be costly and inconvenient.” FCC,
6 Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, FCC
7 03-153, 68 Fed. Reg. 44144, 44165 (July 25, 2003) (“2003 FCC Ruling”). Thus, in order for the
8 exemption to apply, the called party must expressly consent not only to receiving telephone calls, but
9 to receiving calls made by a caller using an autodialer or prerecorded message. This means that
10 plaintiff’s letter to a “Michael Brettell” at CashCall, *see* Statement of Undisputed Facts at ex. A (“Thank
11 you for the consideration of this loan and I appreciate you contacting me as soon as possible on my cell
12 phone.”), indicates only that plaintiff expressly consented to be called on her cell phone by defendant
13 – or more specifically, by its employee Michael Brettell – not that plaintiff expressly consented to be
14 called by defendant using an autodialer or prerecorded voice message.

15 The FCC itself has recognized that a loan applicant who provides a cell phone number on an
16 application has not expressly consented to be called, but rather has given implied consent to be called.
17 In its 2007 Ruling, the FCC relied in part on a prior order it had issued in 1992, in which the FCC
18 determined that “‘persons who knowingly release their phone numbers have *in effect* given their
19 invitation or permission to be called at the number which they have given, absent instructions to the
20 contrary.’” 2007 FCC Ruling at ¶ 9 (emphasis added) (quoting Rules and Regulations Implementing
21 the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd
22 8752, 8769 (1992)). The FCC also stated that “prior express consent *is deemed* to be granted only if the
23 wireless number was provided by the consumer to the creditor.” *Id.* at ¶ 10 (emphasis added). The
24 problems inherent in finding express consent based on conduct that “in effect” amounts to express
25 consent or “is deemed” to amount to express consent are self-evident and need no explanation.

26 Although the Court is not aware of any other court that has addressed whether the FCC’s 2007
27 Ruling is a proper interpretation of the TCPA, other courts have arrived at similar conclusions regarding
28 the meaning of express consent in the context of other provisions of the TCPA. Prior to the passage of

the Junk Fax Protection Act of 2005 – when Congress amended the TCPA explicitly to create an “established business relationship” exception to the TCPA’s prohibition on unsolicited facsimile advertisements – many courts struck down the FCC’s earlier creation of this exception because the mere existence of an established business relationship did not amount to the “prior express permission or invitation” required by Congress. *See Weitzner v. Iridex Corp.*, 2006 WL 1851441, at *3-4 (E.D.N.Y. June 29, 2006) (collecting cases); 47 U.S.C. § 227(a)(4) (2004). For example, the Court of Appeals of Texas explained that “prior express invitation or permission” was unlikely to be found merely because the recipient of a fax advertisement was a business customer of the defendant. *Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 135 S.W.3d 365 (Tex. App. 2004), *overruled on other grounds*, 184 S.W.3d 707 (Tex. 2006) (“This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA’s requirement that the invitation or permission be express.”) (citing the definition of “express” in *Black’s Law Dictionary*). Similarly, the Court of Appeals of Missouri held that the provision of contact information to a membership organization, accompanied by consent to release the contact information to other members of the organization, amounted only to implied consent to be sent faxes, not the express consent required by the TCPA. *Travel Travel Kirkwood, Inc. v. Jen N.Y. Inc.*, 206 S.W.3d 387, 392 (Mo. Ct. App. 2006) (“If the consent is not manifested by explicit and direct words, but rather is gathered only by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties, it is not express consent. Rather, it is merely implied consent.”); *see also Weitzner*, 2006 WL 1851441 at *7; *Sterling Realty Co. v. Klein*, 2005 TCPA Rep. 1353, No. DC-010870-04, slip op. 2 (N.J. Dist. Ct. March 21, 2005) (rejecting the FCC’s “established business relationship” exception and holding that “the fact that a plaintiff had given a business card to [the defendant] and asked him to ‘stay in touch’ does not constitute ‘express’ consent to send advertising faxes”); *Kondos v. Lincoln Prop. Co.*, 2001 TCPA Rep. 1036, No. 00-8709-H, slip op. 3-4 (Tex. Dist. Ct. July 12, 2001) (rejecting the FCC’s “established business relationship” exception where fax recipients had filled out the defendant’s forms and included their fax numbers, because the FCC’s construction of the statute would amend “the TCPA’s definition of unsolicited advertisement from a fax sent without the recipient’s ‘prior express invitation or permission’ to a fax sent without the recipient’s prior express *or implied* invitation or permission” (all emphasis in original)).

1 The Court also notes that the FCC, and industry in general, understands what is required to meet
2 Congress' demand of express consent. The FCC's 2007 Ruling "encourage[d] creditors to include
3 language on credit applications and other documents informing the consumer that, by providing a
4 wireless telephone number, the consumer consents to receiving autodialed and prerecorded message
5 calls from the creditor or its third party debt collector at that number." 2007 FCC Ruling at ¶ 10, n.37.
6 Including such language on credit applications would likely meet the express consent requirement; the
7 absence of similar language on plaintiff's loan application highlights why her consent only could have
8 been determined by implication. The case of *Satterfield v. Simon & Schuster*, 2007 WL 1839807 (N.D.
9 Cal. June 26, 2007), also demonstrates the type of language that typifies express consent. There, a court
10 in this District held that the "prior express consent" exemption of 47 U.S.C. § 227(b)(1)(A) was met
11 where the defendant had sent a promotional text message to a customer who, when filling out an online
12 application for a free ringtone, had checked a box stating "[y]es! I would like to receive promotions
13 from Nextones affiliates and brands. Please note, that by declining you may not be eligible for our
14 FREE content." *Satterfield*, 2007 WL 1839807 at *1, 6. Plaintiff had also clicked on a "submit" button,
15 above which appeared the words "[b]y clicking Submit, you accept that you have read and agreed to the
16 Terms and Conditions." *Id.* at 1. Those terms and conditions, in turn, provided that Nextones could call
17 the applicant's cell phone number "in connection with any text message offering or other campaign."
18 *Id.* This, too, demonstrates that those who wish to use autodialers or prerecorded messages with their
19 customers, whether lending customers or otherwise, are perfectly capable of garnering the express
20 consent of those customers.

21 The Court also finds it necessary to address other arguments in support of the FCC's
22 construction of "prior express consent," whether raised by defendant or discussed in the FCC's 2007
23 Ruling. First, defendant suggests that Congress never really intended the TCPA to apply to lenders
24 making collection calls because the purpose of the TCPA was to prevent unsolicited telemarketing and
25 advertising calls. This purpose, defendant suggests, can be gleaned from the fact that Congress gave
26 the FCC explicit authority to create an exception for calls to *residential* telephone lines where the calls
27 are not for a commercial purpose or where the calls are made for a commercial purpose but "do not
28 include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B). Congress also

1 specifically exempted from the TCPA the sending of unsolicited advertisements via fax where the
2 unsolicited advertisement was sent by one with an “established business relationship” with a recipient
3 who provided his or her fax number voluntarily “within the context of such established business
4 relationship” or who published his or her fax number voluntarily online. *Id.* § 227(b)(1)(C). While the
5 Court recognizes that these exemptions are significant and would apply to plaintiff and other persons
6 who listed their fax numbers or residential telephone numbers on loan applications, the exceptions
7 explicitly do not apply to calls made to cell phone numbers. “Where Congress includes particular
8 language in one section of a statute but omits it in another section of the same Act, it is generally
9 presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”
10 *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (internal quotation marks omitted). While
11 Congress did express its intent to loosen the prohibitions of the TCPA with regard to non-telemarketing
12 calls to residential phone lines and with regard to solicitation faxes sent between parties with established
13 business relationships, Congress chose not to apply these exemptions to cell phone numbers covered
14 by 47 U.S.C. § 227(b)(1)(A)(iii). Thus, *any call* to a cell phone number using an autodialer or a
15 prerecorded message is prohibited by the TCPA, regardless of the purpose of the call or the existence
16 of a business relationship between the caller and the called party, unless the called party has given its
17 “prior express consent.” *See* 2007 FCC Ruling at ¶ 11 (“We note that this prohibition applies [to
18 wireless numbers] *regardless of the content of the call*, and is not limited only to calls that constitute
19 ‘telephone solicitations.’” (emphasis added)). This makes sense, given that Congress enacted the TCPA
20 not only to combat telemarketing calls, but also, as the FCC has recognized, to prevent the annoyance
21 and expense of prerecorded calls to cell phone users. *Id.* at ¶ 7 (“Noting that Congress found that
22 automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live
23 solicitation calls, *and that such calls can be costly and inconvenient*, the Commission determined that
24 the TCPA and its rules prohibit such calls to wireless numbers. *The Commission also recognized that*
25 *wireless customers are charged for incoming calls whether they pay in advance or after the minutes are*
26 *used.*” (emphasis added)).

27 Finally, the Court notes that the FCC relied in part on the legislative history of the TCPA in
28 support of its interpretation of “prior express consent” as including the provision of a cell phone number

1 on a loan application. The FCC cited the House report accompanying the TCPA, which stated that the
 2 “[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party
 3 has provided the telephone number of such a line to the caller for use in normal business
 4 communications.” 2007 FCC Ruling at ¶ 9 (quoting H.R. Rep. 102-317 at 17 (Nov. 15, 1991)). As is
 5 often the case, however, the legislative history can be read to provide support for multiple positions.
 6 Plaintiff points to a Senate report accompanying the bill, which stated that

7 Some telemarketers asked that [the TCPA] be amended to exempt the following
 8 automated calls . . . automated calls made for debt collection purposes These
 9 exemptions are not included in the bill, as reported. The Committee believes that such
 10 automated calls only should be permitted if the called party gives his or her consent to
 11 the use of these machines.

12 S. Rep. 102-178 at 3-4 (Oct. 8, 1991). Such competing legislative histories make it difficult for the
 13 Court to give significant consideration to any of these reports rather than relying on the plain language
 14 of the statute. The Court therefore will not rely on the House report, particularly because the final
 15 version of the TCPA did not include any exception for “normal business communications,” H.R. Rep.
 16 102-317 at 17, and because Congress chose not to create such an exception for cell phones when it
 17 amended other provisions of the TVPA to include similar exceptions for residential telephone lines and
 18 fax machines.

19 In sum, the FCC’s interpretation of the TCPA reads out Congress’ requirement that autodialed
 20 and prerecorded calls may be made to cell phone numbers only where the called party’s consent is
 21 express, and instead permits the application of this exemption where the consent can be implied. This
 22 interpretation is manifestly contrary to the plain language of the statute, is unreasonable, and therefore
 23 is not deserving of deference. *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989)
 24 (“But, of course, no deference is due to agency interpretations at odds with the plain language of the
 25 statute itself.”). Accordingly, as the parties do not dispute any issues of material fact, the Court finds
 26 that partial summary judgment in plaintiff’s favor is appropriate because defendant violated the TCPA
 27 when it called plaintiff’s cell phone using an autodialer and prerecorded messages without plaintiff’s
 28 prior express consent.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiff's motion for partial summary judgment and DENIES defendant's motion for partial summary judgment [Docket Nos. 31 & 35].

IT IS SO ORDERED.

Dated: May 20, 2008



SUSAN ILLSTON
United States District Judge